Supreme Court, U.S.
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No. 04-1018

In the Supreme Court of the United States

DLX, INC.,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY, KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, AND THE SECRETARY, KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, IN HER OFFICIAL CAPACITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT COMMONWEALTH OF KENTUCKY

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COUNTERSTATEMENT OF QUESTION PRESENTED

This case more particularly involves DLX's attempt to recover money damages, under the Fifth and Fourteenth Amendments, against a state defendant in federal court after DLX's aborted efforts to obtain a coal mine permit amendment which might have been issued. The question presented is as follows:

> Did the Sixth Circuit err when it determined that the Commonwealth of Kentucky was immune from suit in federal court for money damages on account of an alleged regulatory "taking" of coal?

SUPREME COURT RULES 29.6 AND 14.1(b) STATEMENT

The actual Respondent is the Commonwealth of Kentucky. The named Respondent, Environmental and Public Protection Cabinet, is an executive agency of the Commonwealth of Kentucky, formerly known as the Kentucky Natural Resources and Environmental Protection Cabinet. The named Respondent, Secretary of the Environmental and Public Protection Cabinet (LaJuana Wilcher being substituted for James E. Bickford) is an executive agency head sued in her official capacity. There is no dispute that each Respondent—Kentucky, the Cabinet and the Secretary sued in her official capacity—is "the State" for purposes of this action. (R.8, DLX Response to Motion to Dismiss, J.A., p. 299, footnote 1.) All nominal Respondents are represented herein by all counsel appearing on the cover of this Brief in Opposition.

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CITATION OF OPINIONS AND ORDERS

The Respondent agrees with Petitioner's description of decisions below, except to note two additional points: (1) the Kentucky Supreme Court upheld the dismissal of DLX's state takings claim on ripeness and exhaustion principles (Petition Appendix D, pp. 58a-64a); and (2) DLX's challenge to the agency's permit denial was the subject of an administrative Hearing Officer's Report and Cabinet Secretary's Order, which DLX chose not to appeal, choosing rather to file its regulatory takings claim in state court. The administrative findings are therefore conclusive, binding and beyond collateral attack. The administrative Hearing Officer's Report and Secretary's Order are found in the record of this case, at R.5, Joint Appendix (hereinafter "J.A.,") pp. 70-101.

COUNTERSTATEMENT OF BASIS FOR JURISDICTION

The Respondent agrees with Petitioner's Statement of Jurisdiction, subject only to the issues evident from the record of this case relating to Eleventh Amendment immunity and ripeness, which are both jurisdictional in nature.

INTRODUCTION

DLX alleges that the Commonwealth of Kentucky is liable in monetary damages for the alleged taking of coal by virtue of the Commonwealth's denial of an amendment to a permit under which DLX had already mined thousands of acres of coal. In a published Opinion, the Sixth Circuit held that the Eleventh Amendment prevents DLX from bringing a claim in federal district court for money damages against a state, even for an alleged "taking" brought pursuant to the Fifth and Fourteenth Amendments. (Pet. App. B, pp. 29a-33a.) No

Judge on the Sixth Circuit requested a vote on DLX's Petition for Rehearing en banc. (Pet. App. A, pp. 1a-2a.) This case was previously the subject of a reported opinion of the Kentucky Supreme Court which dismissed DLX's state takings claim based on ripeness and exhaustion principles. (Pet. App. D, pp. 58a-64a.)

This Court should not accept certiorari in this case because: (1) there is no split or conflict of authority among circuits on the question of the applicability of Eleventh Amendment immunity to takings cases, (2) the Sixth Circuit's Opinion regarding Eleventh Amendment immunity is correct and does not conflict with Supreme Court precedent and (3) there are several other issues necessitating this Court's affirmance on the record, or affirmance by a lower court in the event of remand.

COUNTERSTATEMENT OF THE CASE

Relevant Facts

This case involves DLX's application to amend an existing permit to mine coal under which DLX and its predecessor in interest had already been authorized to mine thousands of acres. The amendment application sought permission to mine 130 acres underneath the Lilley Cornett Woods in Letcher County, Kentucky. (Pet. App. D, p. 59a; R.5, Hearing Officer's Report, J.A., p. 72.) The Lilley Cornett Woods (hereinafter "Woods") is an old growth forest, biological research facility, wildlife refuge and designated National Natural Landmark. (R.5, Hearing Officer's Report, J.A., pp. 72 and 81-4.) Given the nature of this surface resource, the agency's review of the amendment application became concerned with the extent to which mining could be allowed

without interrupting the hydrologic balance in the Woods. (R.5, Hearing Officer's Report, J.A., pp. 76-81.)

The agency ultimately denied the amendment application because DLX withdrew its only viable hydrologic protection plan (which had proposed maintaining a vertical depth of cover, between mining and the Woods, of 250 feet) and substituted its previous submittal (proposing only 110 feet of vertical cover) without exploring any extent of mining between those depths of cover which might afford protection. (R.5, Hearing Officer's Report, J.A., pp. 73, 77-80 and 89.)

The scientific inquiry concerned what extent of mining could be allowed in the area of the Woods without causing mine-induced fracturing to connect with the naturally occurring stress relief fracture system—the primary source of groundwater movement in eastern Kentucky—and thus de-water the Woods. (R.5, Hearing Officer's Report, J.A., pp.76-81.) In regard to this inquiry, and consistent with Supreme Court Rule 15.2, the Respondent points out an egregious misstatement of fact at page 3 of the Petition, where Petitioner states that "DLX submitted a number of permit applications with greater and greater proposed vertical cover for its mining," and that the agency "insisted" on 250 feet of vertical cover. In fact, DLX filed a single application resulting in technical review and resubmittals concerning, among other things, hydrologic protection. In its second-to-last submittal on the hydrologic protection question, DLX proposed 250 feet of vertical cover, and the agency was at that point poised to issue the permit amendment. However, before the agency could issue the amendment, DLX withdrew the 250 foot submittal and substituted a 110 foot vertical cover which it had already been told was unsatisfactory, and requested the agency to issue or deny the application "as is." (R.5, Hearing Officer's Report, J.A., pp. 73, 89 and 102-3.) Therefore,

DLX did not file "a number of applications with greater and greater vertical cover," and the agency did not "insist" on a depth of cover of 250 feet. This misstatement of fact is relevant to the ripeness defect in this case, discussed *infra*.

The agency fact-finder found that the agency was willing to consider alternate proposals or additional scientific studies demonstrating that mining would not cause irreparable harm to the Woods (which might have allowed additional mining, or which might at least enable a takings jury to place a value on any alleged taking), but that DLX did not further engage the discussion. (R.5, Hearing Officer's Report, J.A., pp. 73 and 89.) Rather than seeking either approval of a revised plan, or judicial review of the agency's denial of the amendment application (which by statute it had the right to do, KRS 350.0305), DLX filed a takings action in state court alleging, *inter alia*, that the agency's findings were not supported by substantial evidence, that the agency misapplied its own regulations, and that the agency was arbitrary and capricious. (Compare DLX's state and federal complaints, R.1, J.A., pp. 5-9 and R. 5, J.A., pp. 59-69.)

The state court takings litigation concluded with a published opinion of the Kentucky Supreme Court which upheld the dismissal of DLX's state complaint on subject matter jurisdiction grounds. (Pet. App. D, pp. 58a-64a.) Although the Kentucky Supreme Court intertwined the issues of ripeness and exhaustion, it expressly relied on this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) to conclude its legal analysis as follows:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just

> Compensation Clause. Although "the question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty," . . . the Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. . . Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.

Commonwealth of Kentucky v. DLX, Inc., 42 S.W.3d 624, 626-7 (Ky. 2001), quoting *Williamson County*, at 473 U.S. 190-1 (internal citations omitted), Pet. App. D, pp. 62a-63a. While clearly based on ripeness principles, the Kentucky Supreme Court went on to hold that because DLX waived its statutory right of appeal from the Secretary's Order it could not proceed on its state constitutional takings claim.

Proceedings Below

DLX's federal complaint is nearly identical to the complaint which it filed in state court. (R.1, J.A., pp. 5-9; R.5, J.A., pp. 59-69.) It sought compensation against the Commonwealth of Kentucky for the same alleged taking, upon the same allegations that the agency findings were not supported by substantial evidence and were arbitrary and capricious, and even contained the same erroneous claims for "consequential damages" which DLX has since admitted have no basis in condemnation jurisprudence. (R.8, DLX Response to Motion to Dismiss, J.A., p. 299, footnote 2.) The Commonwealth moved to dismiss the complaint in the District

Court, pursuant to FRCP 12(b)(1), upon grounds of Eleventh Amendment immunity, *Williamson County* ripeness Prong I (failure to seek a final, definitive position on how the agency would apply the applicable regulations to its property), *Williamson County* ripeness Prong II (failure to meaningfully utilize its state court condemnation remedy), res judicata, the Rooker-Feldman doctrine[1] and exhaustion. The District Court agreed that it lacked subject matter jurisdiction on the basis of ripeness (using Prong II of *Williamson County*) and Rooker-Feldman. It did not rule upon any other basis for relief in the Motion to Dismiss. (Pet. App. C.)

On appeal to the Sixth Circuit, the Commonwealth preserved all of its defenses raised in the Motion to Dismiss. The Sixth Circuit held that the Eleventh Amendment operated to prevent DLX from bringing its claim for monetary damages against the Commonwealth of Kentucky in federal district court and rejected the Commonwealth's arguments based on *Williamson County* Prong II ripeness, Rooker-Feldman, res judicata and exhaustion. It declined to rule on *Williamson County* Prong I ripeness finding that, in the absence of fact-finding by the District Court, that inquiry was too fact-intensive. (Pet. App. B.)

In the concurring opinion, Judge Baldock, sitting by designation from the Tenth Circuit, agreed that the Sixth Circuit's Eleventh Amendment analysis was sound, but would have first disposed of the case jurisdictionally under the Rooker-Feldman doctrine and *Williamson County* ripeness Prong I, or as being barred by res judicata. (Pet. App. B, pp. 35a-37a and 39a-41a.) Not a single Judge on the Sixth Circuit

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[1] *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

requested a vote on DLX's Petition for Rehearing en banc, and said petition was denied on October 28, 2004. (Pet. App. A.)

REASONS FOR DENYING THE WRIT

I. There Is No Split or Conflict of Authority Among Circuits on the Question of the Applicability of Eleventh Amendment Immunity to "Takings" Cases.

DLX's insistence that the Sixth Circuit's ruling is inconsistent with the "dominant thrust" (Petition, p. 7) of Fifth Amendment, Eleventh Amendment and Fourteenth Amendment jurisprudence is belied by the decisions of every federal Circuit Court of Appeals that has considered the issue. There is no split or conflict of authority among Circuits on the question of the Eleventh Amendment's applicability to Fifth Amendment takings cases. In fact, all five federal Courts of Appeal which have previously addressed this issue have reached the identical conclusion: *Citadel Corp. v. Puerto Rico Highway Authority*, 695 F.2d 31, 33 (1st Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) ("even if the Constitution is read to require compensation in an inverse condemnation case, the Eleventh Amendment should prevent a federal court from awarding it"); *John G. and Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994) (affirming the district court's dismissal of the plaintiff's Fifth Amendment claim on Eleventh Amendment grounds); *Garrett v. Illinois*, 612 F.2d 1038 (7th Cir. 1980) *cert. denied*, 449 U.S. 821 (1980) (holding Fifth Amendment claim barred by Eleventh Amendment despite assertion of self-executing nature of Fifth Amendment); *Broughton Lumber Company v. Columbia River Gorge Commission*, 975 F.2d 616 (9th Cir. 1992), *cert.*

denied, 510 U.S. 813 (1993) (holding that because state's immunity had not been abrogated or waived, damages claim brought pursuant to Fifth Amendment is barred by the Eleventh Amendment); and *Robinson v. Georgia Department of Transportation*, 966 F.2d 637 (11th Cir. 1992), *cert. denied*, 506 U.S. 1022 (1992) (affirming dismissal of Fifth Amendment takings suit on Eleventh Amendment grounds).

The Circuits are uniform in their application of Eleventh Amendment immunity to Takings Clause damage suits brought against states in federal court. The Circuit Courts' consistent application of the constitutional precedents of this Court reveals the strained nature of DLX's attempt to invent a conflict between this Court's previous decisions and the Sixth Circuit's decision. Since there is no confusion or split of authority among the Circuits, and the Sixth Circuit could find no contrary authority for applying immunity to such suits, there is no reason for this Court to grant certiorari in this case.

The only conflict alleged in the Petition is with another Sixth Circuit decision. However, DLX is wrong when it suggests that the Sixth Circuit's opinion is "squarely in conflict" with *Arnett v. Myers*, 281 F.3d 552 (6th Cir. 2002). (Petition, p. 9.) The Sixth Circuit's decision in *Arnett* in no way stands for the proposition that takings claims seeking compensation are not barred by the Eleventh Amendment. Despite DLX's gross misreading of *Arnett*, it is clear that the plaintiffs there did not assert a claim for money damages. In fact, the Sixth Circuit itself characterized DLX's argument on this point as "lack[ing] merit." (Pet. App. B, pp. 30a-31a, footnote 14.)

The plaintiffs in *Arnett*—owners of fishing rights and duck blinds on Reelfoot Lake—sued Tennessee officials for

declaratory and injunctive relief, not for damages, after the officials physically removed their duck blinds from the lake. *Id.* at 558-9. Unlike the present case, *Arnett* was not a takings case filed for damages, but applied the *Ex parte Young*, 209 U.S. 123 (1908), exception for a takings claim seeking equitable relief. DLX's truncated quotes of the Court's opinion, at pages 9-10 of the Petition, do not convey the true analysis of the holding, which is evident in the Sixth Circuit's succeeding discussion:

> Eleventh Amendment sovereign immunity does not bar the Arnetts' claims in this case. **The Arnetts seek prospective equitable relief to enjoin Tennessee officials** from committing continuing violations of federal law, namely violation of their rights under the Fifth and Fourteenth Amendments. **The *Ex parte Young* exception applies in this case**, and *Couer d' Alene* does not dictate a contrary result.

Arnett, 281 F.3d at 568 (emphasis added). *Arnett*, a decision on a claim for declaratory and prospective injunctive relief, is entirely consistent with the principle that the Eleventh Amendment bars original actions for money damages against a state in federal district court. See *Ex parte Young*, *supra*. Therefore, it should be clear that the Sixth Circuit did not depart from its own precedent in this case. Since the Sixth Circuit in the present case followed both its own established precedent and that of a unanimous set of Circuits, DLX has not presented a substantial question worthy of certiorari.[2]

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[2] Even if the Sixth Circuit's decision in *DLX* were in conflict with the decision of another panel of that Court in *Arnett*, which it is not, such a conflict could be resolved through an en banc review within that Circuit. Such intra-circuit conflicts are ordinarily resolved in

II. The Sixth Circuit's Opinion Regarding Eleventh Amendment Immunity Does Not Conflict With Supreme Court Precedent and Thus the Question Presented Is Not of Such Importance As to Warrant This Court's Attention.

This Court has not heretofore recognized an exception to Eleventh Amendment jurisprudence for Fifth Amendment takings claims, and there is no need to do so now, especially upon the facts presented in this case. Since at least 1890, with the decision in *Hans v. Louisiana*, 134 U.S. 1 (1890), the susceptibility of states to suit in federal court for monetary damages has been well settled. Likewise, the limited exceptions to Eleventh Amendment immunity are also well settled and include only those instances where the state waives its immunity and consents to suit in federal court, where Congress clearly abrogates immunity pursuant to Section 5 of the Fourteenth Amendment, or where the plaintiff sues a state official for prospective injunctive relief to end a continuing violation of federal law or a constitutional deprivation. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), *Alden v. Maine*, 527 U.S. 706 (1999) and *Tennessee v. Lane*, 541 U.S. 509 (2004). As noted in Section I, *supra*, all of the Circuits which have addressed this issue in the context of Fifth Amendment damage suits against States are consistent with this Court's decisions.

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the circuit affected, rather than by this Court upon a petition for writ of certiorari. See *Davis v. United States*, 417 U.S. 333, 340 (1974) and R. Stern & E. Gressman, Supreme Court Practice, 235-6 (8th Ed. 2002). However, as pointed out in this Brief in Opposition, the decision in *DLX* is not even remotely in conflict with *Arnett*.

Moreover, in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this court implicitly concluded that Eleventh Amendment immunity bars federal court takings claims seeking damages against States. At issue in *Lake Country Estates* was a takings claim for damages against a bi-state agency created by a congressionally approved interstate compact between California and Nevada. This court rejected the agency's assertion of Eleventh Amendment immunity as being:

> . . . an expansive reading of the Eleventh Amendment. By its terms, the protection afforded by that Amendment is only available to 'one of the United States.' It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself.

Id. at 400-1. By necessary implication, the Eleventh Amendment would have protected the planning agency's parent states from liability on Lake Country Estates' claims, had they been parties to the suit. This court went on to note that "[b]ecause of our disposition of this question, we need not address petitioner's argument that, even assuming TRPA might be entitled to Eleventh Amendment immunity, such protection was affirmatively waived by the compacting States." (Citation omitted.) *Id.* at 402, footnote 23. Implicit in this discussion is the Court's assumption that the Eleventh Amendment applies to takings claims.

The Sixth Circuit's decision below is also consistent with this Court's long-standing recognition of the parallel immunity of the federal government (absent a waiver) from takings

claims. *See Schillinger v. United States*, 155 U.S. 163, 166-9 (1894) (applying immunity to a claim for the alleged improper use or taking of a patent); *Lynch v. United States*, 292 U.S. 571 (1934) (where, in dicta, after the Court recognized that "the Fifth Amendment commands that property be not taken without making just compensation," *Id.* at 579, the Court stated that "[t]he rule that the United States may not be sued without its consent is all-embracing," *Id.* at 581); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697, footnote 17 (1949), *reh. denied*, 338 U.S. 840 (an injunctive action to compel the delivery of surplus coal under a contract with the War Assets Administration, where the Court stated that at the time of one of its previous decisions in 1882 "[t]here clearly was no remedy available by which [a landowner] could have obtained compensation [from the federal government] for the taking of his land"); and *Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia dissenting) ("[n]o one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. §1491(a)(1), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation," citing *Schillinger*, *supra*).

DLX does not cite any decision which conflicts with any of the cases cited above. It does cite a number of cases, at pages 11-14 of the Petition, which it uses to argue the "self-executing" nature of the Takings Clause. However, it concludes that discussion by explaining that "[t]he analysis of whether the clause is or is not self-executing is not dependent on or even necessarily related to an analysis of the reach of the Eleventh Amendment." (Petition, p. 14.) Therefore, DLX concedes that the arguably self-executing nature of the Fifth Amendment is not germane to the reach of the Eleventh Amendment. DLX cannot cite any decision which recognizes a Takings Clause exception to a State's sovereign immunity

under the Eleventh Amendment, and there is no pressing need to find one now.[3]

DLX's continued reliance on dicta from this Court's plurality opinion in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987) to argue that the Fifth Amendment's "self-executing character" elevates it above the other Amendments (most notably, the Eleventh), is misplaced. Even if DLX is correct that the Fifth Amendment is self-executing, the Court should not grant the Petition. The Sixth Circuit's holding that takings damages are not recoverable against a state in federal court is simply not inconsistent with such an analysis. Compare *Reich v. Collins*, 513 U.S. 106 (1994) (due process clause required state to

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[3] That the Sixth Circuit's decision below does not warrant further review by this Court seems to find support in an amicus brief recently filed by one of the nation's leading property rights advocates. Michael Berger, in his Brief of Amicus Curiae Franklin P. Kottschade, *San Remo Hotel L.P. v. City and County of San Francisco, et al.*, No. 04-340 (2005), at 5, states that: "But the *state* is not involved in 42 U.S.C. §1983 cases like this one. States and their officials cannot be sued under Section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003)]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue in cases like this is whether the local entity—like the City and County of San Francisco at bench—is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of litigation in either state or federal court." (Italics in original.) It would seem, therefore, that not only is this Court's Eleventh Amendment jurisprudence well settled, but so too are the expectations of the property rights bar.

provide state court remedy for deprivation of taxes in violation of federal law).

Also, while *First English* held that the Fifth Amendment does provide a remedy for a taking, the Eleventh Amendment was not even an issue in the case. This is because the defendant there was a municipality, rather than a state. The Eleventh Amendment has no applicability to damage suits brought in federal court against municipalities. *Alden*, at 527 U.S. 756. Similarly, DLX's citation to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), is inapposite. There is no indication that the Eleventh Amendment was raised as a defense in *Palazzolo*. The Eleventh Amendment is an affirmative defense and is not necessarily jurisdictional. Therefore, a court can raise it or it can ignore it if it is waived. *See Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998), and *Kovacevich v. Kent State University*, 224 F.3d 806 (6th Cir. 2000). Contrary to DLX's assertion at page 14 of the Petition, a court's review of a Fifth Amendment takings case without discussing the Eleventh Amendment (as this Court did in *Palazzolo*) does not equate to a holding that Fifth Amendment claims override Eleventh Amendment immunity. *See McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 27-31 (1990) (Eleventh Amendment does not preclude the Supreme Court's exercise of appellate jurisdiction over the decisions of a state's highest court.)

As is the case for any takings plaintiff who has an adequate state court condemnation remedy, DLX cannot truly claim constitutional harm. This is because DLX was not deprived of a remedy, and this is arguably all that the Fifth Amendment guarantees. *See Boise Cascade Corporation v. State of Oregon*, 991 P.2d 563, 567 (Or. 1999), *review denied*, 18 P.3d 1099 (2000), *cert. denied*, 532 U.S. 923

(2001). Because the Kentucky courts have, since at least 1984 with the decision of *Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Stearns Coal & Lumber Company*, 678 S.W.2d 378 (Ky. 1984), *appeal dismissed at* 473 U.S. 921 (1985), *reh. denied*, 473 U.S. 926, expressly recognized a remedy in inverse condemnation, this is not a case where a takings plaintiff is without a reasonable and adequate state condemnation remedy. This Court has stated: " 'the issue [in applying the Eleventh Amendment] is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals.' " *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240, footnote 2, internal citation omitted (1985), *reh. denied*, 473 U.S. 926. Therefore, DLX has not presented a question of sufficient importance to require the granting of certiorari.

While DLX promises in its argument heading an "important question" among its reasons for granting certiorari (Petition, page 7), the text of the Petition fails to state one. All this case is about is whether the Eleventh Amendment bars a remedy in federal court against a non-consenting state for retroactive money damages. Upon this question, this Court's jurisprudence is clear and well settled. The Petition presents no constitutional crisis, particularly because what is submitted for this Court's review is a fact-bound case characterized by procedural waivers, of DLX's own making, giving rise to other jurisdictional and preclusive defects. (See Argument III, *infra*.) Indeed, the substantive portions of DLX's federal complaint (R.1, J.A., pp. 5-9) read like a collateral attack of the unappealed agency findings. This Court need not accept an invitation to create a new exception to Eleventh Amendment immunity upon a case such as this one.

Finally, this Court has observed that land use regulation is something which is traditionally handled at the local government level. *Lake Country Estates, supra*, 402 (1979). Given that this particular case is factually and procedurally flawed, and that most land use disputes arise against local government entities, the impact of the Sixth Circuit's decision below (consistent with decisions of the First, Fifth, Seventh, Ninth and Eleventh Circuits, and with no Circuit to the contrary) to apply the Eleventh Amendment to a federal action against a State for takings damages, is not of sufficient scope to warrant certiorari.

III. There are Several Other Issues Necessitating this Court's Affirmance on the Record, or Affirmance By a Lower Court in the Event of Remand.

Another reason why this Court should deny certiorari is that there are several other jurisdictional or procedural issues on which the Commonwealth of Kentucky will prevail. Therefore, even if the Eleventh Amendment is found not to bar this action, this Court's review is not likely to affect the ultimate outcome of this case.[4]

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[4] The Respondent hereby gives notice in its Brief in Opposition that it will rely upon all issues supported by the record in defending the result below, should this Court grant certiorari. These alternative grounds include *Williamson County* ripeness Prongs I and II, res judicata and application of the Rooker-Feldman doctrine. While this brief is not the appropriate place to extensively argue alternative grounds for affirmance on the merits, the Respondent intends to preserve all issues supported by the record for consideration in its brief on the merits, should this Court grant certiorari. None of the alternative grounds for relief would request this Court to expand in any way the scope of the judgment already

1. Ripeness Prong I—Under this analysis, this Court has required that for a takings claim to be ripe for purposes of a federal court's Article III jurisdiction, an applicant for a benefit or privilege before an administrative agency must first have allowed the agency to arrive at a "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County*, at 473 U.S. 190-1. A takings claim is not ripe where the agency has left open the possibility that some development will be permitted, because "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer & Frates v. County of Yolo, et al.*, 477 U.S. 340, 353, footnote 9 (1986), *reh. denied*, 478 U.S. 1035.

The Commonwealth's argument on this question is based on DLX's withdrawal of its only viable hydrologic protection plan, replacing it with a plan that it had already been told was unsatisfactory, and demanding issuance or denial of the application "as is." (R.5, Hearing Officer's Report, J.A., pp. 73, 77-80, 89 and 102-3.) The Sixth Circuit chose not to resolve this issue as being too fact-dependent, but discussed it as follows:

> It seems at first blush that Kentucky has the better of this argument—DLX's futility argument is based on a mischaracterization of Peterson's testimony, and

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obtained in the Commonwealth's favor. *See Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994) and Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d §4004.4.

> examining that testimony reveals that he would have been receptive to a permit application stipulating less vertical cover accompanied by additional data. . . .

(Pet. App. B, pp. 27a-28a.) The concurring opinion would have dismissed DLX's claim on ripeness grounds, using res judicata and the Rooker-Feldman doctrine. (Pet. App. B, pp. 35a-37a and 39a-41a.) The Commonwealth will maintain that the Sixth Circuit avoided a threshold jurisdictional issue despite an ample record, and without recognizing the preclusive effect of binding, unappealed agency findings establishing the lack of a final agency action under *Williamson County* Prong I. (R.5, Hearing Officer's Report, J.A., pp.73, 77-80, 89 and 102-3.)

2. Ripeness Prong II—Under this analysis, this Court has required that for a federal takings claim to be ripe the claimant must first have used the state court condemnation remedy (if there is one) and been denied compensation. *Williamson County*, at 473 U.S. 194-5. In the present case, the Kentucky Supreme Court has already held that DLX could not invoke the state condemnation court's subject matter jurisdiction due to its prior procedural waivers, and thus left itself in the position of being unable to show that it had in fact been *denied* just compensation. Therefore, as a matter of state law, DLX forfeited its claim. *See also Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87 (1st Cir. 2003), *cert. denied*, 540 U.S. 1090 (2003). This was, in relevant part, the holding of the federal District Court. (Pet. App. C, p. 56a.) The Sixth Circuit rejected this holding upon its erroneous assumption that the Commonwealth of Kentucky was equating the ripeness Prong II requirement with state exhaustion principles. (Pet. App. B, p. 14a.) Thus, if the Eleventh Amendment did not bar DLX's suit in federal district court, *Williamson County* ripeness would. The Commonwealth will

maintain that the federal courts lack subject matter jurisdiction due to DLX's ripeness defects.

3. Res judicata—DLX's federal complaint is nearly identical to the one it filed in state court. (R.1, J.A., pp. 5-9; R. 5, J.A., pp. 59-69.) It arises out of the same permit denial which was the subject of the state takings action. The state's highest court held that it was barred by state and federal law from deciding DLX's takings claims on subject matter jurisdiction grounds. (Pet. App. D.) Despite DLX's attempt to reserve its federal claim, federal authority holds that Kentucky's state court adjudication of DLX's claim is entitled to full faith and credit, and is also entitled to preclusive effect under state and federal law. *See* 28 U.S.C. §1738 and *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984). The concurring opinion below would have dismissed DLX's takings claim upon the view that the *England*-reservation doctrine is applicable only to reserve federal questions in state court after federal court abstention. (Pet. App. B, p. 40a.) The Commonwealth will maintain that DLX's federal claim is precluded by virtue of the state court adjudication of the same allegations.[5]

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[5] The Respondent is aware that the issue of the preclusive effect of a state court takings adjudication, in the face of an attempted reservation of the federal claim, is currently pending this Court's review in *San Remo Hotel, L.P. v. City & County of San Francisco, et al.*, 364 F.3d 1088 (9th Cir. 2004), *cert. granted*, 125 S.Ct. 685 (U.S. Dec. 10, 2004) (No. 04-340). Even if the Court is tentatively inclined to grant certiorari in the present case on the Eleventh Amendment issue, the Respondent respectfully requests that it hold this case until its resolution in *San Remo*, and then deny certiorari in the present case if the decision in *San Remo* supports the Commonwealth's argument herein.

4. Rooker-Feldman—The District Court also held that it lacked jurisdiction under the Rooker-Feldman doctrine, concluding that "the federal claims asserted by DLX are identical to the claims adjudicated in state court," and recognizing that to assert its jurisdiction over the federal claims would put it in the position of reviewing the state court decision in violation of 28 U.S.C. §1257(a). (Pet. App. C, pp. 55a-56a.) *See also Anderson v. Charter Township of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001). While the Sixth Circuit declined to so hold because of its assumption that the state court adjudication was limited to the state doctrine of exhaustion of administrative remedies, the concurring opinion concluded, and the Commonwealth will maintain, that the state court decision was firmly founded upon the ripeness principles laid out in *Williamson County*, and that the federal District Court did not have jurisdiction over DLX's federal claims.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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